



Billing Code: 8025-01

## SMALL BUSINESS ADMINISTRATION

13 CFR Part 115

RIN: 3245-AG56

Surety Bond Guarantee Program

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

**SUMMARY:** The Small Business Administration (SBA) is issuing this final rule to conform the regulations governing the Surety Bond Guarantee Program to certain provisions of the National Defense Authorization Act for Fiscal Year 2013 (NDAA), including the provisions that increase the contract amounts for which SBA is authorized to guarantee bonds, grant SBA the authority to partially deny liability under its bond guarantee, and prohibit SBA from denying liability based on material information that was provided as part of the guarantee application in the Prior Approval Program. This rule also makes changes to the Quick Bond Guarantee Application and Agreement, the timeframes for taking certain actions related to claims, and the dollar threshold for determining when a change in the Contract or bond amounts meets certain criteria or requires certain action. Finally, the final rule eliminates references to the provisions of the American Recovery and Reinvestment Act of 2009 (Recovery Act) that have expired.

**DATE:** This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]

**FOR FURTHER INFORMATION CONTACT:** Barbara J. Brannan, Office of Surety Guarantees, 202-205-6545, email: [Barbara.brannan@sba.gov](mailto:Barbara.brannan@sba.gov).

## SUPPLEMENTARY INFORMATION:

### I. Background Information:

The U.S. Small Business Administration (SBA) guarantees bid, payment and performance bonds for small and emerging contractors who cannot obtain surety bonds through regular commercial channels. SBA's guarantee gives Sureties an incentive to provide bonding for small businesses and thereby assists small businesses in obtaining greater access to contracting opportunities. SBA's guarantee is an agreement between a Surety and SBA that SBA will assume a certain percentage of the Surety's loss should a contractor default on the underlying contract.

On August 1, 2013, SBA published a notice of proposed rulemaking with a request for comments in the Federal Register. The rule proposed to: (1) conform SBA's Surety Bond Guarantee Program ("SBG Program") to certain provisions of the National Defense Authorization Act of 2013 (NDAA); (2) clarify the extent to which a Principal may subcontract work performed under the Contract; (3) make changes to the Quick Bond Guarantee Application and Agreement; (4) increase the dollar threshold for determining when a change in the Contract or bond amounts may result in denial of liability or require certain actions; (5) reduce the timeframes for taking certain actions related to claims; and (6) eliminate references to the provisions of the American Recovery and Reinvestment Act of 2009 (Recovery Act) that have expired. See 78 FR 46528.

The comment period was open until September 30, 2013. SBA received two comments, both from trade associations, that expressed their support for the proposed rule and indicated that the changes are favorable to small businesses. With respect to the

proposed increases in the dollar thresholds, one commenter noted that a Surety may not be in a position to notify SBA or seek SBA's approval when a change order exceeds the specified dollar threshold because a Surety may be required contractually to waive notice of contract amount changes. Under section 115.32(d), a Prior Approval Surety is required to notify SBA of any required changes in the Contract or bond amount that aggregate 25% or \$50,000 (to be increased to \$100,000 under this final rule) "as soon as the Surety acquires knowledge of the change". Thus, the Surety is required to provide notice to SBA under this provision upon acquiring knowledge of these aggregated changes. It is important to note that, under section 115.15(b), the Surety is required to monitor the Principal's progress on bonded Contracts guaranteed by SBA and, accordingly, SBA would expect the Surety to be aware of changes in the Contract or bond amounts. Moreover, for increases in the original bond amount as a result of a single change order of at least 25% or \$50,000 (to be increased to \$100,000 by this final rule), the Surety must, under section 115.32(d), obtain SBA's prior written approval of such increase (and such approval is conditioned upon payment by the Surety of the increase in the Principal's guarantee fee).

In addition, as the commenter observed, SBA now has the discretion, under section 115.19, to deny liability in whole or in part. The commenter suggested that SBA propose regulations to address the use of such discretion where the Surety does not obtain approval or notify SBA of the change in the Contract or bond amount. However, the exercise of this discretion must be based on the circumstances of each case and will be determined on a case-by-case basis.

SBA is adopting the rule as proposed and as described in the section-by-section analysis below.

## II. Section by Section Analysis

Section 115.10. SBA is revising the definition of “Applicable Statutory Limit” to include the maximum amounts of any Contract or Order for which SBA is authorized by the NDAA to guarantee, or commit to guarantee, a Bid Bond, Payment Bond, Performance Bond, or Ancillary Bond. The statutory limits set by the NDAA are (1) \$6.5 million (as adjusted for inflation in accordance with 41 USC 1908); and (2) \$10 million if a contracting officer of a Federal agency certifies that such guarantee is necessary. In addition, SBA is including a reference in the definition to the maximum amounts of any Contract or Order when SBA guarantees the bond in connection with a procurement related to a major disaster pursuant to section 12079 of Pub. L. 110-246. Under this provision, which was enacted on June 18, 2008, the maximum amounts are: (1) \$5 million; and (2) \$10 million on Federal Contracts or Orders at the request of the Head of any Federal agency involved in reconstruction efforts in response to a major disaster. The authority to guarantee bonds under this provision is subject to the availability of funds appropriated in advance specifically for the purpose of guaranteeing bonds for any Contract or Order related to a major disaster. SBA does not expect this authority to be often used, given NDAA’s increase in the maximum amounts for any Contract or Order up to \$6.5 million (and \$10 million if a Federal contracting officer certifies that such guarantee is necessary) and the requirement that funds be appropriated in advance specifically for guaranteeing bonds related to a major disaster. No changes have been made to this provision as proposed.

Section 115.12(b). SBA is deleting the reference to the “Contract Bonds” section of the current “Manual of Rules, Procedures and Classifications of the Surety Association of America” and is replacing this reference with two specific types of bonds, Commercial and Fidelity bonds, which are not eligible for an SBA guarantee. No changes have been made to this provision as proposed.

Section 115.12(e)(3). This provision is being deleted in its entirety, as it relates to requirements imposed by the Recovery Act that expired on September 30, 2010. No changes have been made to this provision as proposed.

Section 115.12(e)(4). This provision is being renumbered as (e)(3), and now reflects the authority to guarantee bonds on Federal Contracts or Orders greater than \$6.5 million, but not exceeding \$10 million, upon a signed certification of a Federal contracting officer, as authorized by the NDAA. No changes have been made to this provision as proposed.

Section 115.12(e)(5). This provision has been renumbered as (e)(4), and implements an alternative statutory authority provided SBA under P.L. 110-246 for guaranteeing bonds for procurements related to a major disaster. References to requirements imposed by the Recovery Act that expired on September 30, 2010, have been deleted. No changes have been made to this provision as proposed.

Section 115.13(a)(5). SBA is revising this provision to clarify that, to be eligible for a bond guaranteed by SBA, the Principal must retain full responsibility for the oversight and management of the Contract, including any work performed by any subcontractor, and may not subcontract the full scope of the statement of work. No changes have been made to this provision as proposed.

Section 115.17(b)(2). SBA is reducing the time frame allowed for a Surety to reimburse or credit SBA for salvage and recovery from 90 days to 45 days after the Surety receives any salvage and recovery. No changes have been made to this provision as proposed.

Section 115.19. SBA is revising the introductory paragraph of this provision to conform it to current law by deleting the time frame reference required by the Recovery Act, which has expired, and by inserting the relevant requirements of the NDAA, including the authority of SBA to deny liability, in whole or in part, within its discretion if any of the circumstances in paragraphs (a) through (h) of this section exist, and the prohibition on denying liability based on material information that was provided to SBA as part of the Surety's guarantee application in the Prior Approval Program. SBA made one minor clarification to the provision as proposed by revising the introductory language in section 115.19 to make it clear that the material information must have been provided to SBA in the Surety's application. SBA is also amending section 115.19(c)(1) by increasing the dollar threshold for determining whether the Surety has committed a material breach of one or more terms or conditions of its Prior Approval or PSB Agreement from \$50,000 to \$100,000. In addition, SBA is amending section 115.19(d) by increasing the dollar threshold for determining whether the Surety has committed a substantial violation of SBA regulations from \$50,000 to \$100,000, and is amending section 115.19(e)(2) by increasing the dollar threshold for determining whether a Prior Approval Surety has agreed to or acquiesced in any material alteration in the terms, conditions, or provisions of the bond from \$50,000 to \$100,000. In each of these sections, the phrase "whichever is less" is being added after the \$100,000 to clarify the

meaning of this requirement. No other changes have been made to this provision as proposed.

Section 115.30(d)(2). SBA is deleting the phrase “or the warranty/maintenance period” from this provision to allow the Quick Bond Application and Agreement (SBA Form 990A) to be used for a Contract that includes a maintenance period of 2 years or less (for defective workmanship or materials only), and with SBA’s approval, for longer maintenance periods and broader coverage, as provided in section 115.10 under the definition of “Contract”. In addition, SBA is increasing the allowable liquidated damages provision from \$250.00 per day to \$1,000.00 per day. No changes have been made to this provision as proposed.

Section 115.31(d). SBA is revising the final sentence of this provision by basing the example on the current statutory limit of \$6.5 million. No changes have been made to this provision as proposed.

Section 115.32(d). SBA is amending this provision by changing the dollar threshold for determining when the Prior Approval Surety must notify SBA of the change and/or obtain SBA’s approval from at least \$50,000 to \$100,000. The phrase “whichever is less” has been added to clarify the meaning of this requirement. No changes have been made to this provision as proposed.

Section 115.35(c)(1). SBA is reducing the time frame allowed for a Prior Approval Surety to submit a claim to SBA from one year to 90 days after the Surety pays the claim. In addition, the title of the SBA Form 994H, “Default Report, Claim for Reimbursement and Record of Administrative Action,” has been changed to “Default

Report, Claim for Reimbursement and Report of Recoveries,” to reflect the current version of the form. No changes have been made to this provision as proposed.

Section 115.35(c)(4). SBA is reducing the time frame for SBA to pay a claim submitted by a Surety in the Prior Approval Program from 90 days to 45 days after receipt of the requisite information. No changes have been made to this provision as proposed.

Section 115.36(a)(3). SBA is reducing the time frame allowed for a Surety to reimburse SBA its share of a settlement from 90 days to 45 days after receipt. No changes have been made to this provision as proposed.

Section 115.67(a). SBA is increasing the dollar threshold for determining when a PSB Surety must present checks for additional fees due from the Principal and Surety from \$50,000 to \$100,000. The phrase “whichever is less” has been added to clarify the meaning of this requirement. No changes have been made to this provision as proposed.

Section 115.69. For imminent breach payments that exceed 10% of the Contract amount, SBA is revising this provision to give the PSB Surety the opportunity to request SBA to approve the amount prior to the Surety making the Imminent Breach payment. SBA will approve such payment if SBA finds that the payment is necessary and reasonable. If the Surety does not request prior SBA approval for such payments, SBA may refuse to reimburse the Surety if SBA finds that the payment that exceeds 10% of the Contract amount was not necessary and reasonable. No changes have been made to this provision as proposed.

SBA 115.70(a). SBA is reducing the time frame allowed for a PSB Surety to submit a claim to SBA from one year to 90 days after the Surety pays the claim. SBA is



also reducing the time frame for SBA to pay a claim submitted by a Surety in the PSB Program from 90 days to 45 days after receipt of the requisite information. No changes have been made to this provision as proposed.

Compliance with Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule does not constitute a significant regulatory action under Executive Order 12866. This is also not a “major rule” under the Congressional Review Act, 5 U.S.C. 800.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

SBA has determined that this final rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Therefore, for the purposes of Executive Order 13132, SBA has determined that this final rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

SBA has determined that this final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

Regulatory Flexibility Act, 5 U.S.C. 601-612

The Regulatory Flexibility Act (RFA) requires administrative agencies to consider the effect of their actions on small entities, small non-profit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. There are twenty-one Sureties that participate in the SBA program, and no part of this final rule would impose any additional cost or any significant burden on them. Consequently, this final rule does not meet the substantial number of small businesses criterion anticipated by the Regulatory Flexibility Act.

#### List of Subjects in 13 CFR Part 115

Claims, Reporting and recordkeeping requirements, Small businesses, Surety bonds.

For the reasons stated in the preamble, SBA amends 13 CFR Part 115 as follows:

#### PART 115 – SURETY BOND GUARANTEE

1. The authority citation for part 115 is revised to read as follows:

Authority: 5 U.S.C. app 3; 15 U.S.C. 687b, 687c, 694a, 694b note; and Pub. L. 110-246, Sec. 12079, 122 Stat. 1651.

2. In § 115.10, revise the definition of “Applicable Statutory Limit” to read as follows:

§ 115.10 Definitions.

\* \* \* \* \*

*Applicable Statutory Limit* means the maximum amount, set forth below, of any Contract or Order for which SBA is authorized to guarantee, or commit to guarantee, a Bid Bond, Payment Bond, Performance Bond, or Ancillary Bond:

(1) \$6.5 million (as adjusted for inflation in accordance with 41 USC 1908);

(2) \$10 million if a contracting officer of a Federal agency certifies, in accordance with section 115.12(e)(3), that such guarantee is necessary; or

(3) if SBA is guaranteeing the bond in connection with a procurement related to a major disaster pursuant to section 12079 of Pub. L. 110-246, see section 115.12(e)(4).

\* \* \* \* \*

3. Amend § 115.12 as follows:

a. Revise paragraph (b);

b. Remove paragraph (e)(3);

c. Redesignate paragraphs (e)(4) and (5) as paragraphs (e)(3) and (4),

respectively;

d. In newly redesignated paragraph (e)(3), revise the heading and the first sentence;

e. Revise newly redesignated paragraph (e)(4) introductory text, remove newly redesignated paragraph (e)(4)(iii), and redesignate paragraph (e)(4)(iv) as paragraph (e)(4)(iii);

f. In newly redesignated paragraph (e)(4)(iii), remove “paragraph (e)(5)” and add in its place “paragraph (e)(4)”.

The revisions read as follows:

§ 115.12 General program policies and provisions.

\* \* \* \* \*

(b) *Eligibility of bonds.* Bid Bonds and Final Bonds are eligible for an SBA guarantee if they are executed in connection with an eligible Contract, as defined in § 115.10, Definitions. Commercial and Fidelity bonds are not eligible for SBA guarantees. Ancillary Bonds may also be eligible for SBA's guarantee. A performance bond must not prohibit a Surety from performing the Contract upon default of the Principal.

\* \* \* \* \*

(e) \* \* \*

(3) *Federal Contracts or Orders in excess of \$6,500,000 (as adjusted for inflation in accordance with section 1908 of title 41, United States Code).* SBA is authorized to guarantee bonds on Federal Contracts or Orders greater than \$6,500,000 (as adjusted for inflation in accordance with 41 USC 1908), but not exceeding \$10,000,000, upon a signed certification of a Federal contracting officer. \* \* \*

(4) *Alternative authority to guarantee bonds for Contracts and Orders related to a major disaster area.* Subject to the availability of funds appropriated in advance specifically for the purpose of guaranteeing bonds for any Contract or Order related to a major disaster, SBA may, as an alternative to the authority otherwise set forth in this Part, guarantee bonds on any Contract or Order under the following terms and conditions:

\* \* \* \* \*

4. In § 115.13, amend paragraph (a)(5) by revising the second sentence and adding a third sentence to read as follows:

§ 115.13 Eligibility of Principal.

(a) \* \* \*

(5) \* \* \* SBA will not guarantee bonds for Principals who are primarily brokers.

In addition, the Principal must retain full responsibility for the oversight and management of the Contract, including any work performed by any subcontractor, and may not subcontract the full scope of the statement of work.

\* \* \* \* \*

#### § 115.17 [Amended]

5. In § 115.17, amend paragraph (b)(2) by removing “90 days” and adding “45 days” in its place.

6. Amend § 115.19 by revising the introductory text and by removing “\$50,000” wherever it appears in paragraphs (c)(1), (d), and (e)(2) and adding in its place “\$100,000, whichever is less”.

The revision reads as follows:

#### § 115.19 Denial of liability.

In addition to equitable and legal defenses and remedies under contract law, the Act, and the regulations in this Part, SBA is relieved of liability in whole or in part within its discretion if any of the circumstances in paragraphs (a) through (h) of this section exist, except that SBA shall not deny liability on Prior Approval bonds based solely upon material information that was provided to SBA as part of the Surety’s guarantee application.

\* \* \* \* \*

#### § 115.30 [Amended]

7. In § 115.30, in paragraph (d)(2)(ii)(C), remove the phrase “or the warranty/maintenance period”, and in paragraph (d)(2)(ii)(D), remove “\$250” and add “\$1,000” in its place.

8. Amend § 115.31 by revising the final sentence of paragraph (d) to read as follows:

§ 115.31 Guarantee percentage.

\* \* \* \* \*

(d) \* \* \* For example, if a contract amount increases to \$6,800,000, SBA’s share of the loss under an 80% guarantee is limited to 76.5% [ $6,500,000/6,800,000 = 95.6\% \times 80\% = 76.5\%$ ].

\* \* \* \* \*

§ 115.32 [Amended]

9. In § 115.32, amend paragraph (d)(1) by removing “\$50,000” and adding “\$100,000, whichever is less” in its place.

10. Amend § 115.35 by revising paragraph (c)(1), and in paragraph (c)(4), by removing “90 days” and adding “45 days” in its place.

The revision reads as follows:

§ 115.35 Claims for reimbursement of Losses.

\* \* \* \* \*

(c) *Claim reimbursement requests.* (1) Claims for reimbursement for Losses which the Surety has paid must be submitted (together with a copy of the bond, the bonded Contract, and any indemnity agreements) with the initial claim to OSG on a “Default Report, Claim for Reimbursement and Report of Recoveries” (SBA Form

994H), within 90 days from the time of each disbursement. Claims submitted after 90 days must be accompanied by substantiation satisfactory to SBA. The date of the claim for reimbursement is the date of receipt of the claim by SBA, or such later date as additional information requested by SBA is received.

\* \* \* \* \*

§ 115.36 [Amended]

11. In § 115.36, amend paragraph (a)(3) by removing “90 days” and adding “45 days” in its place.

§ 115.67 [Amended]

12. In § 115.67, amend paragraph (a) by removing “\$50,000” and adding “\$100,000, whichever is less” in its place.

13. Revise § 115.69 to read as follows:

§ 115.69 Imminent Breach.

*(a) No prior approval requirement.* SBA will reimburse a PSB Surety for the guaranteed portion of payments the Surety makes to avoid or attempt to avoid an Imminent Breach of the terms of a Contract covered by an SBA guaranteed bond. The aggregate of the payments by SBA under this section cannot exceed 10% of the Contract amount, unless the Administrator finds that a greater payment (not to exceed the guaranteed portion of the bond penalty) is necessary and reasonable. The PSB Surety does not need to obtain prior SBA approval to make Imminent Breach payments, except that the PSB Surety may request SBA to approve payments that exceed 10% of the Contract amount prior to the Surety making the payment. In no event will SBA make any duplicate payment under any provision of these regulations in this part.

*(b) Recordkeeping requirement.* The PSB Surety must keep records of payments made to avoid Imminent Breach.

§ 115.70 [Amended]

14. In § 115.70, amend paragraph (a) by removing the term “1 year” in the first sentence and adding “90 days” in its place and by removing the term “90 days” in the third sentence and adding “45 days” in its place.

Jeanne A. Hult,  
Acting Administrator.

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